IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 77-1593

DONALD G. COX,
Petitioner,

v.

STATE OF WASHINGTON,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

DONALD C. BROCKETT
Spokane County Prosecuting Attorney

FRED J. CARUSO
Deputy Prosecuting Attorney

County-City Public Safety Building
West 1100 Mallon Avenue
Spokane, Washington 99260

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MISCELLANEOUS

The Respondent, State of Washington, by its attorneys, Donald C. Brockett, Prosecuting Attorney for Spokane County and Deputy Prosecuting Attorney, Fred J. Caruso, submits the following Brief in Opposition to the Petition for Writ of Certiorari.

OPINION BELOW

Respondent accepts Petitioner's Statement of the Opinion Below.

JURISDICTION

Petitioner is invoking jurisdiction under 28 USC §1257(3) to review his convictions in this case of Count I, Aiding and Abetting Grand Larceny (R.C.W. 9.54.010 (2)), and Count II, Aiding and Abetting Unlawful Sale of Securities (R.C.W 21.20.010). However, the Grand Larceny conviction under Count I does not involve a federal question under 28 USC §1257(3) and Petitioner does not so claim. Therefore, it is respectfully submitted that this court should not accept jurisidction to review Petitioner's conviction of Count I, and for the reasons set forth below should also not review Petitioner's conviction of Count II.

QUESTIONS PRESENTED

Petitioner's first four questions presented involve what respondent understands to be one basic issue; that is: whether or not the Washington Court of Appeals decision in this case affirming

Petitioner's conviction of Count II, Aiding and Abetting Unlawful Sale of Securities (R.C.W 21.20.010) is in conflict with this court's decision in Ernst & Ernst v. Hochfelder, 425 US 185, 47 L.Ed.2d 668, 96 S.Ct. 1375 (1976).

Petitioner's 5th and 6th questions presented concern Count I and do not involve a federal question.

STATUTORY AND REGULATORY PROVISIONS

Respondent accepts Petitioner's Statement of the statutory and regulatory provisions but cites the following statutory and regulatory provisions as also being involved in this case:

15 USC §78ff (a) provides in pertinent part:

> "Any person who wilfully violates any provision of this chapter, or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this chapter, . . . shall upon conviction be fined . . . or imprisoned . . ."

The corresponding law in Washington is found in R.C.W. 21.20.400 which provides in pertinent part:

> "Any person who wilfully violates any provision of this chapter . . . or wilfully violates any rule or order under

this chapter . . . shall upon conviction be fined . . . or imprisoned . . ."

The Washington aiding and abetting statute applicable to this case is RCW 9.01.030 and provides as follows:

> "Principal defined. Every person concerned in the commission of a felony, gross misdemeanor or misdemeanor, whether he directly commits the act constituting the offense, or aids or abets in its commission, and whether present or absent; and every person who directly or indirectly counsels, encourages, hires, commands, induces or otherwise procures another to commit a felony, gross misdemeanor or misdemeanor, is a principal, and shall be proceeded against and punished as such. . . ."

STATEMENT OF THE CASE

With respect to Count I, Aiding and Abetting Grant Larceny (R.C.W. 9.54.010 (2)), the trial court, contrary to Petitioner's assertion, did instruct the jury concerning the required intent to deprive and defraud. Element Instruction No. 3 (Appendix A) specifically required a finding of intent to deprive and defraud on the part of the principal offender, Shultz, and that Petitioner Cox "wilfully and unlawfully" aided and abetted Shultz. Instruction No. 8 (Appendix B) defined "wilfully" as intentionally and purposely.

Instructions Nos. 18 and 19 (Appendix C) defined intent. Instruction No. 15 (Appendix D) expressly defined the term "specific intent" regarding Grand Larceny. Instruction No. 16 (Appendix E) defined aiding and abetting in the language of the statute, R.C.W. 9.01.030, and stated that the acts done must be with an "intent to aid, abet or encourage the commission of the crime."

Moreover, the Washington Court of Appeals in this case did not find a "deficiency in the Grand Larceny instruction" that was "cured by other jury directives" as asserted by Petitioner. On the contrary, the opinion held that the instructions, as a whole, adequately covered the mental element of the charge of Aiding and Abetting Grand Larceny. State v. Cox, 17 Wn. App. 896, 900, 566 P.2d 935, 938 (1977).

With respect to Count II, Aiding and Abetting Unlawful Sale of Securities (R.C.W 21.20.010), the trial court did instruct on the necessary mental state required. Element Instruction No. 5 (Appendix F) required that the principal offender Shultz "wilfully" committed the unlawful sale of securities and that Petitioner Cox "wilfully" aided and abetted Shultz.

The decision below affirming Petitioner's conviction of Count II, clearly held that the instructions requiring the Petitioner's acts be "wilful" adequately covered the mental state necessary for a criminal violation of the Washington State Securities Act. State v. Cox, 17 Wn. App. 896, 903-4, 566 P.2d 935, 940 (1977). Respondent submits that the decision in this respect is not contrary to this court's opinion in Ernst & Ernst v.

Hochfelder, 425 US 185, 47 L.Ed.2nd 668, 96 S.Ct. 1375 (1976).

REASONS FOR DENYING THE WRIT

I. NO FEDERAL QUESTION IS INVOLVED AS TO COUNT I, AIDING AND ABETTING GRAND LARCENY (R.C.W. 9.54.020(2)) AND PETITIONER'S WRIT SHOULD BE DISMISSED FOR WANT OF JURISDICTION CONCERNING THIS CONVICTION.

With respect to Petitioner's conviction of Count I, Aiding and Abetting Grand Larceny (R.C.W. 9.54.010(2)) Petitioner raises no federal question.

In his statement of the case, Petitioner's counsel, who was not counsel at trial, states that the trial court refused to give Petitioner's proposed instruction requiring the jury to find a specific intent to deprive and defraud at the time of the taking and that the Court of Appeals held that this "deficiency" was "cured" by other instructions. However it is clear that the trial court's instructions more than adequately covered this element of the offense of Grand Larceny.

Instruction No. 3 (Appendix A) set out the elements of the offense, requiring that the jury find that the principal Shultz obtained the money with the "intent to deprive and defraud" and that Petitioner Cox both "wilfully and unlawfully" aided Shultz. It is also significant to note that this instruction

further required that Shultz obtained the money by false representations and that both Shultz and Cox knew the representations were false.

Instruction No. 8 (Appendix B) defined "wilfully" as intentionally and purposely. Instructions Nos. 18 and 19 (Appendix C) defined intent. Instruction No. 15 (Appendix D) defined "specific intent."

Thus, a "specific intent" instruction was given in this case and the other instructions on intent more than adequately covered the required mental state. In fact, the instructions on intent were quite favorable to Petitioner and went beyond that which the court was required to give, because under Washington law the instruction defining "wilfully" would have been sufficient. State v. Stewart, 73 Wn.2d 701, 704, 440 P.2d 815 817 (1968); State v. Mello, 3 Wn. App. 555, 556-557, 477 P.2d 42, 43 (1970), reversed on other grounds, 79 Wn.2d 279, 484 P.2d 910 (1971); State v. Martin, 14 Wn. App. 74, 77-78, 538 P.2d 873, 876 (1975).

In addition Instruction No. 16 (Appendix E) specifically told the jury that the Petitioner's actions must have been done with an "intent" to aid or abet. The mental state required under this instruction is simply that Petitioner had knowledge of the wrongful purpose of the principal. State v. Gibson, 79 Wn.2d 856, 490 P.2d 874 (1971). Respondent contends that there is no question but that the intent instructions given covered this point. Indeed, as noted by the Court of Appeals' decision in this case, the Petitioner's contention in this respect was simply "not

well taken." State v. Cox, 17 Wn. App. 896, 900, 566 P.2d 935, 938 (1977).

Petitioner clearly recognizes that no federal question is involved concerning the conviction under Count I, and the only reason he assigns for granting the writ in this respect is that where a federal question is "mixed with non-federal questions" the court should decide the entire case. No authority is cited for this proposition. Moreover, this is not a case where one count involves mixed questions, but is a case involving two separate counts, with the count in question having absolutely no federal question, mixed or otherwise.

Thus, it is respondent's contention that no federal question having been raised at any stage with respect to the conviction under Count I, this court should deny the writ for want of jurisdiction to even consider Count I.

II. THE WRIT SHOULD BE DENIED AS TO COUNT II BECAUSE THE PETITIONER DOES NOT CHALLENGE THAT CONVICTION UNDER SUB-SECTIONS (1) AND (3) OF R.C.W. 21.20.010.

In Count II, Petitioner was charged with wilfully and unlawfully aiding and abetting a crime that was committed by at least three alternative methods. Under the test set forth in State v. Arndt, 87 Wn.2d 374, 553 P.2d 1328 (1976), it is clear that the unlawful sale of securities prohibited by R.C.W. 21.20.010 defines but one crime that may be committed by three different means, which are set out in

subsections (1), (2) and (3) of the statute. Paraphrasing the statute, these subsections essentially provide as follows: (1) employ a scheme to defraud; (2) make a false statement or fail to make a material statement; or (3) engage in a course of business which operates as a fraud.

Element Instruction No. 5 (Appendix F) told the jury that the principal offender, Shultz, must have "wilfully" committed the crime in one of the three means set out and that the Petitioner Cox "wilfully" aided and abetted Shultz. This instruction further told the jury that the different means were simply alternatives and that one had to be proved, but that the jury must be unanimous as to any of the three alternatives. It should be noted that since State v. Arndt, supra, unanimity as to the mode of commission is no longer required in Washington, as long as the jury is unanimous that the crime was committed.

On appeal, Petitioner did not contend that subsections (1) and (3) were deficient in requiring an intent to defraud. This is so because inherent in the very language of those subsections is the requirement of an intent to defraud; that is, if one "wilfully," which means intentionally, employees a scheme to defraud (subsection 1) or "wilfully" engages in a fraudulent course of business (subsection 3), then he necessarily has an intent to defraud. It is only with respect to subsection (2) that Petitioner complains that an intent to defraud instruction should have been given. In this respect the Court of Appeals stated at 17 Wn. App. 566 P.2d 938:

> The defendant contends that the court's instruction No. 5

> is inadequate on the basis that it fails to require the necessary intent to defraud and deprive. The first portion of this instruction specified the activities which constitute unlawful sale of securities and is based upon statutory language. Subsections (1.) and (3.) specifically require an intent to defraud or deceive, whereas subsection (2.) does not. The defendant's proposed instruction would add an intent to defraud or deprive as an element under subsection (2.).

Hence, Petitioner is not attacking the intent requirements of the Count II conviction under the alternatives of subsection (1) and subsection (3) of R.C.M. 21.20.010. There was more than substantial evidence to support the Count II conviction under those alternatives. In effect, Petitioner is asking the court to speculate as to what alternative means of committing the offense the jury found.

But even assuming arguendo that the jury based the Count II conviction on subsection (2), they must necessarily have found a specific intent to defraud. The subsection (2) alternative involved, in part, the making of a false statement or false representation. Count I specifically involved Grand Larceny by "False Representations" and the instructions expressly required an intent to deprive and defraud and that Cox wilfully aided and abetted knowing the representations were false. Since the jury found that Cox was guilty of Count I, then it follows that the jury would automatically find Petitioner guilty of Count II under subsection

(2), upon the additional finding that the fraud was committed "in connection with the offer or sale of securities."

For these reasons, it is respectfully submitted that Petitioner's writ to review Count II should be denied.

III THE WRIT SHOULD BE DENIED BECAUSE THE COURT OF APPEALS DECISION IN THIS CASE IS NOT CONTRARY TO ERNST & ERNST v. HOCHFELDER, SUPRA.

While the instant case was pending appeal, Ernst & Ernst v. Hochfelder, 425 US 185, 47 L.Ed.2d 668, 96 S.Ct. 1375 (1976) was decided, and held that negligent conduct alone will not establish liability in a private action for damages under Rule 10b-5 of the Securities and Exchange Commission and that some element of "scienter" is necessary.

Petitioner contends that the decision in the instant case is in direct conflict with Hochfelder. However, assuming the applicability of Hochfelder to the Petitioner's Count II conviction, it is respectfully submitted that there is no conflict.

In determining that some element of "scienter" is required, the majority opinion in Hochfelder emphasized the language of section 10(b) of the 1934 Securities Act, 15 USC Section 78j(b), concerning the use of "any manipulative or deceptive device or contrivance." In this respect it was stated at 425 US 197 that these words:

". . . strongly suggest
that section 10(b) was intended

to proscribe knowing or intentional misconduct."

It is further stated at 425 US 199 that the term "manipulative" is particularly significant because it "connotes intentional or wilful conduct designed to deceive. . ." The majority opinion concluded in part at 425 US 214 that the language of section 10(b) comports with ". . . the commonly understood terminology of intentional wrongdoing . . ."

Thus, the scienter required by Hochfelder involves "wilfull" or "knowing or intentional misconduct." That this is the "scienter" requirement of Hochfelder is seen by the recent application of Hochfelder in McLean v. Alexander, 420 F.Supp. 1057, 1080 (D. Delaware, 1976), wherein it was said:

> "However, Hochfelder does serve as a starting point for analysis. It defined 'scienter' as the 'mental state embracing intent to deceive, manipulate, or defraud.'[116] Further, it stated 'that § 10(b) was intended to proscribe knowing or intentional misconduct.'[117] It necessarily follows that scienter for purposes of imposition of civil liability under section 10(b) and Rule 10b-5 encompasses knowing or intentional misconduct. If the result were otherwise, Section 10(b) and Rule 10b-5 would be more restrictive in substantive scope than the substantive law of fraud." (Footnotes omitted.)

Thus, in private actions under section 10(b) or rule 10b-5, mere negligence is insufficient and some element of "scienter" is required which involves wilfull, knowing or intentional misconduct.

It should be noted that, contrary to Petitioner's assertion, in private actions involving securities violations, the State of Washington is in accord with this court's decision in Hochfelder. See Ludwig v. Mutual Real Estate Investors, 18 Wn. App. 33, 567 P.2d 658 (1977).

The decision in Hochfelder sets out essentially the same rule that is applied in criminal violations of the Securities Act of 1934, 15 USC § 78ff(a) which provides in relevant part:

> "Any person who wilfully violates any provision of this chapter . . . or wilfully violates any rule or order under this chapter . . . shall upon conviction be fined . . . or imprisoned . . ."

Criminal violations under this provision will not be supported by evidence of negligence only, but require "wilfull" or "knowing" conduct. United States v. Dixon, 536 F.2d 1388, 1396-1397 (2nd Cir. 1976); United States v. Natelli, 527 F.2d 311, 322 (2nd Cir. 1975), cert. denied, 425 US 934, 96 S.Ct. 1663, 48 L.Ed.2d 175 (1976); United States v. Schwartz, 464 F.2d 499, 509 (2nd Cir. 1972), cert. denied, 409 US 1009, 93 S.Ct. 443, 34 L.Ed.2d 302 (1972); United States v. Peltz, 433 F.2d 48, 55 (2nd Cir. 1970), cert. denied 401 US 955, 91 S.Ct. 974, 28 L.Ed.2d 238 (1971); United States

v. Simon, 425 F.2d 796,809 (2nd Cir. 1969), cert. denied, 397 US 1006, 90 S.Ct. 1235, 25 L.Ed.2d 420 (1970).

In United States v. Dixon, supra, it was stated at 536 F.2d 1396-1397:

> "The trial judge apparently recognized all this and defined 'knowingly' as used in the indictment to be substantially synonymous with 'wilfully'. Thus he told the jury that the standard of proof respecting state of mind was the same for both the proxy and 10-K counts; that 'an act is done knowingly if done voluntarily and intentionally and not because of a mistake or accident or other innocent reason'; that 'an act is done willfully if done intentionally and deliberately'; and that the 'word "knowingly" means that the defendant must be aware of what he was doing and what he was not doing; the word "willfully" under [the proxy and 10-K counts] means that the defendant acted deliberately and intentionally and his acts, statements or omissions were not the result of innocent mistake, negligence or inadvertence or other innocent conduct.' Such an instruction accords with the standards of the first clause of § 32(a) insofar as it simply collapses 'knowingly' into 'willfully,' and, as we have noted, it was the first clause

that set the standard to be applied."

See also Herlands, Criminal Aspects of the Securities Exchange Act of 1934, 21 Virginia Law Review 139, 148-149 (1934); annot. 20 A.L.R.Fed. 227 (1974).

It is respectfully submitted, therefore, that Hochfelder did not change the required mental state for criminal violations of the Securities Act of 1934 or Rule 10b-5. The parameters of the mental state required for such criminal violations have been well established prior to Hochfelder. Rather, Hochfelder simply raised the mental state required in private actions to essentially the same mental state that had already been required to prove a criminal violation. In both instances the mental state encompasses wilful, knowing or intentional misconduct. Thus, there is no need, as Petitioner asserts, that the principle of Hochfelder "will surely carry over into criminal cases." The requirement of scienter in criminal violations has already been well established.

With respect to criminal violations of the securities laws of the State of Washington, the acts complained of also must be "wilfull." R.C.W 21.20.400 provides in pertinent part:

> "Any person who wilfully violates any provision of this chapter . . . or wilfully violates any rule or order under this chapter . . . shall upon conviction be fined . . . or imprisoned. . ."

That this statute proscribes wilfull, knowing or intentional conduct is illustrated by State v. Hynds, 84 Wn.2d 657, 664, 529 P.2d 829, (1974), wherein it is stated in approving intent instructions similar to those given in this case:

> "These instructions do not use the precise language of the federal decisions; however, they tell the jury that the violation of the Securities Act must be wilfull, that the untrue statements must be intentionally made, and that the defendant had to know in his own mind that his untrue statements would not occur, or that the statements were made recklessly without knowledge of facts and with intent to deceive.

Moreover, in Washington if an act is done "wilfully," then this is sufficient for those crimes involving a particular intent.

In State v. Stewart, 73 Wn.2d 701, 440 P.2d 815 (1968), the court instructed the jury that the assault must be wilfull. On appeal, it was argued that second degree assault was a specific intent crime and the court erred in giving only an instruction on "wilfully" and erred in refusing a proposed instruction which stated that the jury must find "specific intent on the part of the defendant." In rejecting this contention, it was said at 73 Wn.2d 704, 440 P.2d 817:

> "The basis of defendant's objection to instruction No. 6 is that it withdraws from the jury's consideration a necessary element of the crime of

second degree assault: specific intent. We do not agree.

[1] The crucial word in the statute and in the instruction is 'wilfully.' Even appellate counsel (who did not try this case in the superior court), admits in his brief that 'had this instruction (No. 6, supra) defined "wilfully" it may have been proper. . . .'

Further definition was not necessary. In State v. Spino, 61 Wn.2d 246, 377 P.2d 868, (1963), this court said:

> 'The term "wilfully"is not ambiguous. As used in criminal statutes, it means intentionally and designedly.'

Prior decisions of this court support the definition set forth in Spino, supra. In State v. Vanderveer, 115 Wash. 184, 196 Pac. 650 (1921), it is stated that 'An act done willfully is done intentionally and designedly.' (italics ours.) In State v. Evans, 32 Wn.2d 278, 201 P.2d 513 (1949) (a second degree assault case), the court pointed out that 'A wilful act is one done intentionally, not accidentally.'

Instruction No. 6 did not withdraw specific intent as a necessary element of the crime of second degree assault. Requested instruction No. 1 would

add nothing to the instruction given and it was not error to refuse it."

In State v. Mello, 3 Wn.App. 555, 477 P.2d 42 (1970), rev'd on other grounds, 79 Wn.2d 279, 484 P.2d 910 (1971), it was again held that an instruction defining "wilfully" was sufficient in a specific intent crime. It was there said at 3 Wn.App. 556-557, 477 P.2d 43:

"The matter of requisite intent for the crime seems to have been decided in State v. Stewart, 73 Wn.2d 701, 440 P.2d 815 (1968). In that case, the jury was instructed that they could find the defendant guilty if they found acts sufficient to constitute the crime that were 'wilfully' done. The Supreme Court found that the word 'willful' sufficiently defined the required intent. Thus, we feel that the instructions here, which both require the acts to be done willfully[1] and define willful[2] are sufficient to put properly before the jury this element of the crime. See State v. Travis, 1 Wn. App. 971, 465 P.2d 209 (1970); State v. Turner, 78 W.D.2d 276, 474 P.2d 91 (1970)." (Footnotes omitted)

In State v. Martin, 14 Wn.App. 74, 538 P.2d 873 (1975), it was said at 14 Wn.App. 77-78, 538 P.2d 876:

"The defendant next contends it was error to refuse his proposed instruction which would have informed the jury that the State was

required to prove a 'specific criminal intent on the part of the defendant,' requiring the State to show that 'the defendant knowingly did an act which the law forbids, purposely intending to violate the law.' The court did instruct the jury that every person who willfully assaults another with a weapon or thing likely to produce bodily harm is guilty of assault in the second degree, and that the word 'wilfully' means 'intentionally and purposely and not accidentally.' The instructions when read as a whole clearly required the State to prove that the defendant intended to commit the act. It was not necessary that the term 'specific' be used to describe the intent which must be proven to have been fixed in the mind of the defendant. A similar instruction was proposed in State v. Stewart, 73 Wn.2d 701, 440 P.2d 815 (1968). It was held that use of the term 'specific' in an instruction to the jury was unnecessary, the court stating that it was sufficient if an instruction is given defining the term 'willfully' as meaning 'intentionally and not accidentally.' The defendant could argue his theory of the case, and it was not error to refuse the proposed instruction." (Emphasis added)

Thus, it is clear that the trial court did not err in giving its instructions defining wilfully and further, it did not err in refusing to give appellant's proposed

instruction on specific intent. The authorities also do not find any error in the court's failing to use the term "specific intent."

See also, State v. Hynds, supra, which specifically involves securities violations.

In the present case, the element instruction for Count II, Instruction No. 5 (Appendix F) clearly required that the principal offender Shultz "wilfully and unlawfully" committed the securities violation, and that Petitioner Cox "wilfully and unlawfully" aided and abetted. These terms were defined in Instruction No. 8 (Appendix B) respectively as "intentionally and purposely" and "without and beyond the authority of the law."

The mental state required by all the authorities, both federal and state, was met. The standard employed further meets the test of Hochfelder -- wilfull, knowing or intentional misconduct.

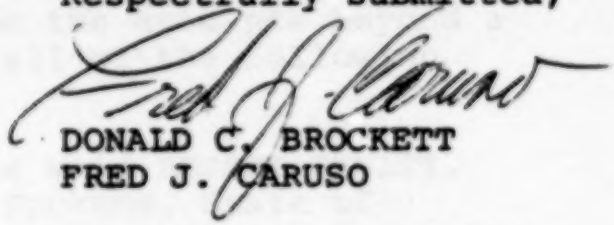
While the Court of Appeals' decision in this case did discuss cases which may be changed by Hochfelder, the decision was also based on the fact that the test of wilful and intentional conduct was met. State v. Cox, 17 Wn. App. 896, 903-4, 566 P.2d 935, 940 (1977).

Therefore, it is respectfully submitted that the Petitioner's writ to review Count II should be denied as the test of Hochfelder was complied with in this case.

CONCLUSION

For the above reasons, respondent respectfully requests that the Petitioner's Writ of Certiorari be denied.

Respectfully submitted,



DONALD C. BROCKETT
FRED J. CARUSO

Counsel for Respondent

APPENDIX A

INSTRUCTION NO. 3

Before you can find the defendant guilty of the crime of GRAND LARCENY, as charged in Count I of the Information, you must find from the evidence beyond a reasonable doubt all of the following elements:

1. That the said ROBERT SHULTZ, in the County of Spokane, State of Washington, on or about between October 12, 1973, and April 18, 1974, then and there being, did then and there wilfully and unlawfully, with intent to deprive and defraud the owner thereof, obtain from ANNABELLE G. HEIDECKER a sum of money in excess of $75.00 in lawful money of the United States, the property of and belonging to the said ANNABELLE G. HEIDECKER;

2. That the said ROBERT SHULTZ obtained such money by color and aid of false and fraudulent representation and pretenses;

3. That such representations were false, the said ROBERT SHULTZ and defendant, DONALD COX, knowing the same to be false;

4. That said ANNABELLE G. HEIDECKER believed said representation, relied thereon, and was deceived;

5. That the said defendant, DONALD COX, in the County of Spokane, State of Washington, on or about between October 12, 1973 and April 19, 1974,

then and there being, did then and there wilfully and unlawfully aid, abet, counsel and encourage ROBERT SHULTZ in the commission of the crime of GRAND LARCENY as aforesaid.

If you find that any of the foregoing elements have not been established by the evidence in this case beyond a reasonable doubt, you must acquit the defendant of the crime of GRAND LARCENY, but if you find all of these elements have been established by the evidence in this case beyond a reasonable doubt, you must find the defendant guilty of GRAND LARCENY.

APPENDIX B

INSTRUCTION NO. 8

The term "unlawfully" as used in the Information in this case means without and beyond the authority of the law.

"Wilfully" as used in this case means intentionally and purposely.

APPENDIX C

INSTRUCTION NO. 18

The intent with which an act is done is a mental process and as such generally remains hidden within the mind where it was conceived. It is rarely, if ever, susceptible of proof by direct evidence, but must be inferred or gathered, if at all, from the outward manifestations and the words and acts of the party entertaining it.

INSTRUCTION NO. 19

The law presumes that every man intends the natural and probable consequences of his own acts. Where it takes a particular intent to constitute a crime that intent must be proved to the satisfaction of the jury. It does not require direct or positive proof but the circumstances must be such as would authorize the jury to infer the intent with which the act was done.

APPENDIX D

INSTRUCTION NO. 15

You are instructed that the term "specific intent" as it is used in these instructions, in connection with the offense of Grand Larceny, means the specific intent in the mind of the person taking property, at the actual time of the taking, to defraud and thereby permanently deprive the rightful owner of his or her property.

APPENDIX E

INSTRUCTION NO. 16

Under the laws of this State every person concerned in the commission of a crime, whether he directly commits the act constituting the offense or aids or abets in its commission, and whether present or absent, and every person who directly or indirectly counsels, encourages, induces or otherwise procures another person to commit a crime is a principal, and shall be proceeded against and punished as such.

In this action, the aiding and abetting or encouragement which will render one a principal may be by acts or words, but it must, to create guilt, be done with an intent to aid, abet or encourage the commission of the crime. There must be some form of overt act, the doing of something that either directly or indirectly contributes to the criminal act, some form of demonstration or expression of affirmative action and not merely approval or acquiescence.

Where two or more persons engage in a common criminal act, and all are present at the scene of a crime, the acts of one are the acts of each of the others.

APPENDIX F

INSTRUCTION NO. 5

Before you can find the defendant guilty of the crime of UNLAWFUL SALE OF SECURITIES, as charged in Count II of the Information, you must find from the evidence beyond a reasonable doubt all of the following elements:

1. That the said ROBERT SHULTZ, in the County of Spokane, State of Washington, on or about between October 12, 1973 and April 19, 1974, then and there being, did then and there wilfully and unlawfully, either

(a) Employ any device, scheme, or artifice to defraud, or

(b) Make any untrue statement of material fact or omit to state a material fact necessary in order to make the statement made, in light of the circumstances under which it was made, not misleading, or

(c) Engage in any act, practice, or course of business which operated or would operate as a fraud or deceit upon any person;

2. That said act or acts were done in connection with the offer or the sale of securities to ANNABELLE G. HEIDECKER;

3. That the said defendant, DONALD COX, in the County of Spokane, State of Washington, on or about between October 12, 1973 and April 19, 1974, then and there being, did then and there wilfully and

unlawfully aid, abet, counsel and encourage ROBERT SHULTZ in the commission of the crime of UNLAWFUL SALE OF SECURITIES as aforesaid.

If the State has failed to establish by the evidence in this case, beyond a reasonable doubt, any one of the foregoing elements, then you must acquit the defendant, DONALD COX, of the crime of UNLAWFUL SALE OF SECURITIES, as charged in Count II of the Information.

With respect to elements 1(a), 1(b), and 1(c), these are alternatives, and it is only necessary for the State to prove either 1(a), 1(b), or 1(c); however, it is necessary that all of you agree either to 1(a), 1(b), or 1(c) in order to return a verdict of guilty.

On the other hand, if the State has established by the evidence beyond a reasonable doubt all of the foregoing elements, it will be your duty to find the defendant, DONALD COX, guilty of the crime of UNLAWFUL SALE OF SECURITIES.